IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1947 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SANTOSH BHARATSING - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR NN PRAJAPATI for Appellant(s) : 1,
MR.BHATE, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 08/10/2007

ORAL JUDGMENT

Present appeal is preferred under the provisions of Section 374 of the Code of Criminal Procedure, whereby the appellant-original accused No.1 has challenged the legality and validity of the judgment

and order of conviction and sentence passed by the learned Additional Sessions Judge, Court No.14, Ahmedabad, in Sessions Case No.95 of 2005 on 25th July, 2005. The appellant-original accused No.1 has been convicted and sentenced alongwith original accused No.2 as under:

i) For the offence punishable under Section 363 of the Indian Penal Code, the appellant is ordered to undergo five years rigorous imprisonment and to pay a fine of Rs.2,000/- each and in default of making payment of fine to undergo three months rigorous imprisonment.

ii) For the offence punishable under Section 365 of the Indian Penal Code, the appellant is ordered to undergo one year rigorous imprisonment and to pay a fine of Rs.2,000/- each and in default of making payment of fine to undergo three months rigorous imprisonment.

iii) For the offence punishable under Section 376 read with Section 511 and under Section 34 of the Indian Penal Code, the appellant

is ordered to undergo seven years rigorous imprisonment and to pay a fine of Rs.7000/- each and in default of making payment of fine to undergo six months rigorous imprisonment.

iv)The learned Judge has further ordered that in the event of recovery of amount of fine, Rs.10,000/- would be given to the guardian of the victim as compensation and accused persons be given the benefit under the provisions of Section 428 of the Code of Criminal Procedure.

2. The present appeal is received through the jail authorities and Mr.N.M.Prajapati, learned Advocate is appointed by this High Court to place the case of the present appellant, who has challenged the legality and validity of the judgment and order of conviction and sentence by raising certain grounds. Mr.Prajapati, has submitted that the order of conviction and sentence has not been challenged by the original accused No.2 and at present he is undergoing imprisonment.

3. Mr.Prajapati, learned Advocate and Mr.Bhate, learned A.P.P., has taken this Court through the case of prosecution and evidence led during the course of trial. However, after some deliberation, Mr.Prajapati has fairly accepted that the appeal against the order of conviction recorded by the learned trial Judge is not sustainable considering the nature of evidence led by prosecution and the fact that victim was a tender aged girl about seven to nine years, who was mentally challenged also and therefore, Mr.Prajapati does not press this appeal so far as conviction recorded by the learned trial Judge is concerned. However, Mr.Prajapati has submitted that this Court may reduce the substantive punishment.

4. It is submitted by Mr.Prajapati that on the date of incident, i.e., on 4th April, 2004 the victim girl was allegedly abducted, but when it is clear from the evidence that present appellant was in a drunken condition the punishment imposed by the learned trial Judge under Section 363 of the Indian Penal Code is unduly harsh and therefore it may be reduced. It is submitted that there is no evidence of satisfactory nature under which it can be said that the

prosecution has successfully established the charge of the offence punishable under Section 376 read with Section 511 of the Indian Penal Code. Of course, the witnesses have stated that the accused was attempting to commit rape but before he could actually commit rape, he was seen by one Prosecution Witness No.1-Dhaniben, who has been examined at Exh.8 and on account of her shouting, the other witnesses rushed to the spot and accused persons were caught on the spot.

5. The submission of Mr.Prajapati is that accused at the most could have been held guilty of the charge of offence punishable under Section 354 read with Section 114 of the Indian Penal Code, but if this Court is of the view that the present accused is rightly held responsible for the offence punishable under Section 376 read with Section 511 of the Indian Penal Code, even then, the substantive punishment of five years ought to have been imposed considering the scheme of sub-section 2 (f) of Section 376 of the Indian Penal Code. True it is that law provides for life imprisonment, but the minimum punishment prescribed is of ten years. So the punishment of five years could have been the adequate punishment, as the present appellant was in a drunken condition and there is a hazy evidence in nature as to the activity that was being done by the accused at relevant point of time.

6. Mr.Bhate, learned A.P.P., after going through the medical evidence led by Prosecution Witness No.3-Dr.Bhargavbhai B. Zaveri, who has been examined at Exh.11 and Prosecution Witness No.6-Dr.Nitin J. Dave, who has been examined at Exh.21 and the documentary evidence available on record mainly the F.S.L. Reports (Exh.41 and 42) so also, the serological report, (Exh.43) has submitted that this Court can consider the point of reduction of punishment so far as offence punishable under Section 376 read with Section 511 of the Indian Penal Code is concerned. According to Mr.Bhate, there should not be any reduction in the punishment imposed so far as offence punishable under Section 365 of the Indian Penal Code is concerned. He has submitted that unfortunately for want of formal appeal, which could have been filed by the respondent-State praying for enhancement of sentence, this Court may not enhance the period of punishment, otherwise this is a fit case wherein the extreme penalty under Section 365 of the Indian Penal Code could have been imposed. So, there should not be any alteration mainly the reduction in the quantum of punishment because there is sufficient evidence on record to show that victim-girl was not only a tender aged, but of seven to nine years only. The trial Court has also ascertained that she was mentally weak, the day on which she was called to the Court room

for recording her evidence and her mannerism and conduct in the Court room has been recorded by the trial Court. It is submitted that such an innocent girl was taken out from guardianship of her parents with an ulterior motive. The motive the appellant-accused is inferable and drunken state of mind cannot be considered as an excuse and this aspect has rightly been observed by the learned trial Judge.

7. Mr.Bhate, learned A.P.P., has further submitted that the maximum punishment prescribed in case where rape is committed on a girl below twelve years, is for life imprisonment, but the law framers have prescribed minimum punishment for this offence is of ten years. The medical evidence referred by Mr.Prajapati shows that before actual attempt of committing rape, the accused was caught. The stigma was not present, the day on which the accused was examined by the Prosecution Witness No.3-Dr.Bhargav Zaveri. But, in absence of any mark of blood or semen on any of the muddamal articles seized, the Court would not impose punishment beyond ten years, even on the proof of commission of rape, i.e. on the evidence of slightest penetration. In such a situation, this Court can reduce the substantive punishment keeping in mind the case found proved to five years i.e. for offence punishable under Section 376 read with Section 511 of the Indian Penal Code. The present appellant is original

accused No.1 and principal offender as per the story of the case of prosecution. Mr.Bhate, has also drawn the attention of this Court to the charge framed by the lower Court and it would be beneficial to reproduce the same herein after under which the present appellant has been attributed for the actual act of attempt of committing rape.

> "1. You accused persons on 4th April, 2004, around or between 10:30 and 1500 hrs, in connivance with each other abducted Pinki, dumb daughter of witness Parsaram Maheraji Vanzara from Maruti Industries Factory situated at Narol Road with an intention to commit sexual intercourse.
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> 2. Thereafter you accused first took the victim in the filed of Fulaji Pujaji of Survey No.247, situated in the Sim of Village Vinzol where the complainant is doing agricultural work and then took her in the deep field covered with branches. Initially, you accused, at about 12 noon, started pressing breast of the victim under the tree (Piludi Tree) on the southern side of the field and also tried to persuade the victim.
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> 3. Thereafter, you accused at about 3 O'clock took the victim on southern-western corner of the field and laid down her on the ground near small water canal, unbuttoned your pant and with an intention to commit rape you accused also moved up on her. Thereafter on hearing shouts of complainant, the surrounding people working in the field rushed to the place and caught red handed you accused on the spot.

> 4. Thus you accused with an intention to commit rape on the victim aged about 9 yrs. ,- the daughter of the complainant Parsaram Maherajaji Vanzara abducted her and caught red handed trying to commit rape on her on the spot and thereby committed offences punishable under Sections 363, 365, 376, 511 and 34 of Indian Penal Code which fall within the jurisdiction of this Court."

The present appellant-accused therefore cannot be awarded any substantive punishment for the offence punishable under Section 34 of the Indian Penal Code because for that offence the original accused No.2, at present is undergoing imprisonment and original accused No.2 has not filed any appeal as stated by Mr.Prajapati.

8. In view of the above submission, the Court is of the view that the substantive punishment imposed by the learned trial Court for the offence punishable under Section 376 read with Section 511 of the Indian Penal Code can be reduced. The details emerging from the serological examination report (Exh.43) and report of the chemical analyzer (Exh.42) would indicate that there is little evidence to show that any act which could have proved the actual commission of rape was done. The accused was about to commit rape, but before that he was caught. No such appeal for enhancement of punishment is preferred and when minimum period of punishment

prescribed under Section 376 (2) (f) of the Indian Penal Code is of ten years then the case found proved by the learned trial Judge is of Section 376 read with Section 511 of the Indian Penal Code. The learned trial Judge could have imposed punishment for five years rigorous imprisonment, therefore the substantive punishment if reduced to two years, then it would met the ends of justice.

8.1 The Court cannot ignore that appellant was in a drunken condition and none of the clothes of the victim-girl was found either stained with blood or semen. True it is that when the victim-girl was examined, some other injuries were found on her body and therefore the learned trial Judge had accepted the version given by Prosecution Witness No.1-Dhaniben and other prosecution witnesses who had caught the appellant red handed alongwith original accused No.2. The accused persons were not granted bail and at present they are in prison and their jail record appears to be straight. One of the copy received by learned A.P.P. in the year 2006 is before the Court.

9. In view of the aforesaid discussion, the present Criminal Appeal is partly allowed. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Court

No.14, Ahmedabad in Sessions Case No.95 of 2005 on 25th July, 2005 is hereby confirmed for the offence punishable under Sections 363 and 365 of the Indian Penal Code. Whereas, the judgment and order of sentence for the offence punishable under Section 376 read with Section 511 of the Indian Penal Code is hereby modified and reduced to five years from seven years rigorous imprisonment.

9.1 However, the order of sentence of fine and in default punishment for all the offences shall remain unaltered. The order of granting compensation of Rs.10,000/- to the guardian of minor girl in the event of recovery of amount of fine from the accused is also upheld. Order and Direction accordingly.

(C.K.BUCH, J.)

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